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Attorneys for Plaintiff FINISAR CORPORATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

FINISAR CORPORATION, a Delaware
corporation,

Plaintiff,

v.

U.S. BANK TRUST NATIONAL
ASSOCIATION, a national banking
association, not in its individual capacity,
but solely in its capacity as Indenture
Trustee in behalf of all Holders of Finisar
Corporation's 5¼% Convertible
Subordinated Notes due 2008, 2½%
Convertible Senior Subordinated Notes due
2010, and 2½% Convertible Subordinated
Notes due 2010; and DOES 1 through 10,
inclusive,

Defendants.

Case No. 5:07-CV-04052-JF-PVT

**JOINT CASE MANAGEMENT
STATEMENT AND [PROPOSED]
ORDER THEREON**

Date of Initial Case Management

Conference: **Friday, November 30, 2007**

Time: **10:30 a.m.**

Courtroom: **3**

District Judge: Hon. Jeremy Fogel

Magistrate Judge: Hon. Patricia V. Trumbull

Complaint Filed: June 21, 2007

Trial Date: None Yet Set

1 Having met and conferred as required by Rule 26(f) of the Federal Rules of Civil
 2 Procedure on Tuesday, November 6, 2007, plaintiff Finisar Corporation (“Finisar”) and defendant
 3 U.S. Bank Trust National Association, in its capacity as indenture trustee (“U.S. Bank”), jointly
 4 make the following report, pursuant to Rule 26(f) of the Federal Rules of Civil Procedure and
 5 Civil Local Rule 16-9.

6 I. JURISDICTION AND SERVICE

7 Finisar commenced the above-captioned action (the “Action”) in the Superior Court of the
 8 State of California for the County of Santa Clara (the “State Court”), from which it was removed
 9 by U.S. Bank. In the Action, Finisar seeks a declaration that it is not in default under a series of
 10 three indentures between Finisar and U.S. Bank (the “Parties”) as a result of its not yet having
 11 filed certain financial reports with the Securities Exchange Commission (the “SEC”) and U.S.
 12 Bank. Although U.S. Bank has answered, it has not counterclaimed.

13 U.S. Bank contends that Finisar’s cause of action arises under federal law (thus bringing
 14 the Action within the federal question jurisdiction of this Court) because determining whether
 15 Finisar is entitled to relief requires the Court to interpret, apply or otherwise determine the effect
 16 of two federal statutes, the Securities Exchange Act of 1934 and the Trust Indenture Act of 1939,
 17 under the indentures. Finisar disputes U.S. Bank’s allegation that the Action falls within the
 18 subject matter jurisdiction of this Court, and has moved for remand. “Plaintiff Finisar
 19 Corporation’s Amended . . . Motion to Remand Action to Santa Clara County Superior Court”
 20 (the “Remand Motion”) was heard by the Court on Friday, November 2, 2007 and is currently
 21 under submission. In Finisar’s view, the Court should defer entry of any case management order,
 22 including any order on this statement, until after the jurisdictional issues presented by the Remand
 23 Motion are adjudicated; and the Court should enter no such order if the Remand Motion is
 24 granted.

25 There are no unserved named parties. Neither personal jurisdiction nor venue is disputed.

26 II. FACTS

27 In November 2006, the Audit Committee of Finisar’s Board of Directors voluntarily
 28 commenced an internal investigation into historical stock option grants and practices within the

1 company. Finisar has informed U.S. Bank that the investigation is now largely complete and that
2 the task of preparing any necessary restatements of financials is well underway. Because the
3 investigation and restatements may affect disclosures required to be made in various SEC filings,
4 Finisar has delayed those filings pending completion thereof.

5 U.S. Bank serves as the indenture trustee pursuant to a series of three trust indentures (the
6 "Indentures") under which Finisar issued three series of convertible notes (the "Notes"). By three
7 nearly identical letters dated April 23, 2007 (the "Letters"), one for each Indenture, U.S. Bank
8 asserted that Finisar's delay in filing a Form 10-Q for the fiscal quarter ended January 31, 2007
9 with the SEC and with U.S. Bank constituted a default under the Indentures, which, if not
10 remedied within sixty days of the letters, would ripen into an "Event of Default" under the
11 Indentures (thereby entitling U.S. Bank, as indenture trustee, to accelerate Finisar's repayment
12 obligations under the Notes). Finisar commenced this Action on June 21, 2007, seeking a judicial
13 declaration that it is not in default under the Indentures as alleged by U.S. Bank or, alternatively,
14 that enforcing acceleration of the Notes for such a technical default would be inequitable. U.S.
15 Bank has asserted additional defaults after the commencement of this Action relating to Finisar's
16 delay in filing subsequent financial statements.

17 The existence and terms of the Indentures are not in dispute, nor are the facts alleged by
18 U.S. Bank to constitute a default. Instead, the Parties dispute whether the conduct constitutes a
19 default under Section 4.02 of the Indentures, which provides:

20 The Company shall file with the Trustee, within 15 days after it files such
21 annual and quarterly reports, information, documents and other reports
22 with the [Securities and Exchange] Commission, copies of its annual
23 report and of the information, documents and other reports (or copies of
24 such portions of any of the foregoing as the Commission may by rules and
25 regulations prescribe) which the Company is required to file with the
26 Commission pursuant to Section 13 or 15(d) of the [Securities] Exchange
27 Act [of 1934]. If at any time the Company is not subject to Section 13 or
28 15(d) of the Exchange Act, such reports shall be provided at the times the
Company would have been required to provide reports had it continued to
be subject to such reporting requirements. The Company shall also
comply with the other provisions of TIA Section 314(a).

According to Finisar, this provision does not require it to provide copies of reports to U.S. Bank
until fifteen days after those reports are actually filed with the SEC; according to U.S. Bank, this

1 provision, which must be interpreted with reference to federal law incorporated therein, requires
2 Finisar to make timely filings with the SEC and to provide copies of those filings to U.S. Bank
3 within fifteen days of when they are due to be filed (rather than when they are actually filed).

4 III. LEGAL ISSUES

5 As noted above, the Parties dispute whether the delay by Finisar in filing certain reports
6 with the SEC and with U.S. Bank constitutes a default under Section 4.02 of the Indentures. Thus
7 far, two courts outside of this Court's jurisdiction are known to have addressed the issue. First,
8 the Supreme Court of New York, New York County, in *Bank of New York v. BearingPoint, Inc.*,
9 824 N.Y.S.2d 752 (N.Y. Sup. Ct. 2006), found default under similar circumstances. Second, the
10 United States District Court for the Southern District of Texas, in *Cyberonics, Inc. v. Wells Fargo*
11 *Bank National Association*, 2007 WL 1729977 (S.D. Tex. June 13, 2007), found no default under
12 similar circumstances.

13 U.S. Bank contends that the interpretation of Section 4.02 requires the Court to interpret
14 and apply the provisions of the Securities Exchange Act of 1934 and the Trust Indenture Act of
15 1939 under the Indentures, and that this Action thus arises under the laws of the United States and
16 falls within the federal question subject matter jurisdiction created by 28 U.S.C. § 1331. Finisar
17 contends that the interpretation of the relevant provisions of the Indentures does not require the
18 interpretation or application of any federal statute, and that this Action does not arise under the
19 laws of the United States or otherwise fall within the federal question subject matter jurisdiction
20 created by 28 U.S.C. § 1331.

21 U.S. Bank also contends that the interpretation of Section 4.02 presents an issue of law for
22 the Court, which is suitable for summary judgment. Subject to discovery, Finisar presently
23 contends that there may be parol evidence bearing on the proper interpretation of Section 4.02,
24 rendering the interpretation of that provision an issue of fact rather than of law.

25 IV. MOTIONS

26 As noted above, the Remand Motion has already been heard and is currently under
27 submission.
28

1 U.S. Bank contemplates moving for summary judgment. If U.S. Bank moves for
2 summary judgment, then Finisar may bring a cross-motion for summary judgment.

3 Although the Parties contemplate additional motions should the Action be remanded to
4 the State Court, no other motions are presently contemplated by either Party if the Action is not
5 remanded.

6 **V. AMENDMENT OF PLEADINGS**

7 Neither Party presently contemplates any amendment of any pleading or any joinder of
8 any additional parties. The Parties have agreed that any motion seeking either amendment or
9 joinder should be filed not later than December 7, 2007.

10 **VI. EVIDENCE PRESERVATION**

11 The Parties have agreed that discovery may encompass (a) the negotiation, preparation,
12 and execution of the Indentures and certain documents collateral thereto; and U.S. Bank further
13 contends, although Finisar disputes, that discovery may also encompass (b) the investigation and
14 preparation of Finisar's restated financial statements. The Parties have further agreed that their
15 respective preservation obligations would not extend beyond materials, exclusive of metadata,
16 generated in connection with the negotiation, preparation, investigation and/or execution thereof.
17 Finisar, based upon what it understands to have been an agreement reached by the Parties,
18 disputes the existence of any obligation effective prior to August 29, 2007 to have preserved
19 materials generated in connection with the investigation and preparation of Finisar's restated
20 financial statements. U.S. Bank disagrees with Finisar's understanding of the agreement reached
21 by the Parties.

22 Accordingly, Finisar has instructed employees known or believed to have participated in
23 the preparation or execution of the Indentures or collateral materials to preserve documents
24 generated in connection therewith. Finisar has also generally instructed employees known or
25 believed to have participated in the investigation and preparation of its restated financial
26 statements to preserve all documents relating to its historical stock option grants and practices,
27 whether or not specifically related to the investigation and preparation of its restated financial
28

1 statements. Finisar's electronically stored information is periodically backed-up on tapes
2 maintained in a third-party archive.

3 U.S. Bank has also instructed employees known or believed to have participated in the
4 preparation or execution of the Indentures or collateral materials to preserve documents, including
5 electronic information, generated in connection therewith pursuant to U.S. Bank's policy
6 regarding document retention in litigation matters.

7 **VII. DISCLOSURES**

8 The Parties have agreed to defer making initial disclosures, as required by Rule 26(a) of
9 the Federal Rules of Civil Procedure, until after the disposition of the Remand Motion. If the
10 Action is not remanded, the Parties will make the disclosures mandated by Rule 26(a) of the
11 Federal Rules of Civil Procedure within fourteen calendar days of entry of the Court's order
12 denying the Remand Motion.

13 **VIII. DISCOVERY**

14 As noted above, the Parties agree that discovery may encompass (a) the negotiation,
15 preparation, and execution of the Indentures and certain documents collateral thereto; and U.S.
16 Bank further contends, although Finisar disputes, that discovery may also encompass (b) the
17 investigation and preparation of Finisar's restated financial statements. No discovery on other
18 topics is presently contemplated by either Party.

19 The Parties have further agreed that all document discovery may be satisfied by hardcopy
20 documents or their electronic equivalent, and thus that metadata will not be sought and need not
21 be provided.

22 No further limitation or modification of the discovery rules is contemplated, nor is any
23 phasing of discovery.

24 To date, no discovery has been taken. The Parties have agreed to complete all discovery
25 by May 30, 2008.

26 **IX. RELATED CASE**

27 This is the second action between Finisar and U.S. Bank presenting essentially the same
28 legal issues for adjudication. The first declaratory judgment action, like the instant Action, was

1 also commenced by Finisar in the State Court and removed by U.S. Bank to this Court, where it
2 was assigned Case No. 5:07-CV-02101-JF-PVT. Finisar commenced the first declaratory
3 judgment action after receiving what U.S. Bank titled notices of default alleging that Finisar had
4 defaulted by not timely filing a Form 10-Q for the third fiscal quarter of its 2006 fiscal year. The
5 first declaratory judgment action was remanded to the State Court on October 12, 2007, as a
6 result of procedural issues not applicable in the present Action. The first declaratory judgment
7 action is still pending and is being litigated in the State Court.

8 **X. RELIEF**

9 Finisar seeks alternative declarations. First, Finisar seeks a declaration that, by not yet
10 providing to U.S. Bank copies of reports not yet filed with the SEC, it is not in default under the
11 Indentures so as to authorize U.S. Bank to declare an acceleration (*i.e.*, to declare all principal and
12 accrued interest immediately payable). Second, in the alternative, Finisar seeks a declaration that
13 enforcing an acceleration under the circumstances presented would be inequitable. Finisar is not
14 seeking damages or any other form of relief.

15 U.S. Bank is not seeking any relief.

16 **XI. SETTLEMENT AND ADR**

17 Prospects for settlement are uncertain.

18 Informal discussions relative to settlement are ongoing between counsel, focusing to date
19 on the facilitation of informal information exchanges.

20 U.S. Bank understands, based on discussions with counsel, as memorialized in
21 correspondence, that Finisar cannot give further consideration to whether, when, and under what
22 conditions a meeting could be arranged between Finisar and U.S. Bank and the holders of the
23 Notes until Finisar completes its investigation. Finisar disputes U.S. Bank's characterization of
24 its statements regarding settlement.

25 To date, no formal alternative dispute resolution process has been employed. The Parties
26 have agreed to submit their dispute to Early Neutral Evaluation, pursuant to ADR Local Rule 5.

27 The Parties are not presently aware of any non-dispositive motions that are likely to
28 promote settlement.

XII. MAGISTRATE JUDGE

The Parties have not at present consented to have a magistrate judge conduct all further proceedings including trial and entry of judgment.

XIII. OTHER REFERENCES

The Parties do not consider the Action suitable for reference to binding arbitration, a special master, or the Judicial Panel on Multidistrict Litigation.

XIV. NARROWING OF ISSUES

The Parties contemplate filing a joint stipulation of undisputed facts by January 11, 2008.

XV. SCHEDULING

The Parties propose the following dates:

Designation of Experts:	March 7, 2008
Discovery Cutoff:	May 30, 2008
Pretrial Conference:	June 2008
Trial:	June 2008

XVI. TRIAL

Should the Action proceed to trial, the Parties anticipate a trial not more than one trial week in duration. Finisar has made a demand for jury trial in the Action. U.S. Bank has not yet determined whether it will oppose the demand on the grounds that Finisar seeks only equitable relief.

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XVII. INTERESTED ENTITIES OR PERSONS

Both Parties have filed the "Certification of Interested Entities or Persons" required by Civil Local Rule 3-16, collectively identifying the persons and entities listed in the attached "Schedule of 'Interested' Parties" as having a financial or other interest in the subject matter that could be substantially affected by the outcome of the Action.

DATED: November 21, 2007

Sterling A. Brennan
L. Rex Sears
WORKMAN NYDEGGER A PROFESSIONAL CORPORATION

Caroline McIntyre
BERGESON, LLP

By /s/ L. Rex Sears
L. Rex Sears
Attorneys for Plaintiff FINISAR CORPORATION

DATED: November 21, 2007

Michael B. Fisco
Abby E. Wilkinson
FAEGRE & BENSON LLP

By /s/ Abby E. Wilkinson
Abby E. Wilkinson
Attorneys for Defendant
U.S. BANK TRUST NATIONAL ASSOCIATION

I attest that concurrence in the filing of the foregoing document has been obtained from each of the identified signatories thereof.

DATED: November 21, 2007

Sterling A. Brennan
L. Rex Sears
WORKMAN NYDEGGER A PROFESSIONAL CORPORATION

Caroline McIntyre
BERGESON, LLP

By /s/ L. Rex Sears
L. Rex Sears
Attorneys for Plaintiff FINISAR CORPORATION

ORDER

PURSUANT TO STIPULATION, IT IS SO ORDERED.

DATED: _____

Hon. Jeremy Fogel
United States District Judge

SCHEDULE OF "INTERESTED" PARTIES

1 OppenheimerFunds, Inc.
 2 T. Rowe Price Associates, Inc.
 3 Frank H. Levinson
 4 VantagePoint Venture Partners
 5 Penn Capital Management, Inc.
 6 Vanguard Group, Inc.
 7 Kopp Investment Advisors, LLC
 8 Fidelity Management & Research (US)
 9 Pioneer Investment Management, Inc.
 10 Barclays Global Investors, NA
 11 Dawson-Herman Capital Management Inc.
 12 Ardsley Partners
 13 Sand Hill Advisors, Inc.
 14 6th Avenue Investment Management Company, LLC
 15 Jerry S. Rawls
 16 Longwood Investment Advisors, Inc.
 17 GLG Partners, LP
 18 Emerald Advisers, Inc.
 19 Hunter Hall Investment Management Ltd.
 20 Schroder Investment Management North America Inc.
 21 RiverSource Investments, LLC
 22 College Retirement Equities Fund
 23 State Street Global Advisors (US)
 24 Dimensional Fund Advisors, Inc.
 25 Pequot Capital Management, Inc.
 26 Peconic Partners, LLC
 27 Bear Stearns Asset Management, Inc.
 28 Mayo Investment Advisers, LLC
 29 NorthPointe Capital, LLC
 30 Swedbank Robur AB
 31 033 Asset Management, LLC
 32 Delaware Investments
 33 J.P. Morgan Investment Management Inc. (New York)
 34 Deutsche Asset Management Americas
 35 New Generation Advisors, Inc.
 36 Northern Trust Investments, NA
 37 California Public Employees' Retirement System
 38 Sun Life Assurance Company of Canada (Toronto)
 39 Black River Asset Management, LLC
 40 Placemark Investments, Inc.
 41 Washington Capital Management, Inc.
 42 Cavalry Asset Management LP
 43 RCM Capital Management LLC
 44 JDS Capital Management, Inc.
 45 Pennsylvania Public School Employees Retirement System
 46 JPMorgan Investment Advisors Inc.

1	47	D.E. Shaw & Co., LP
	48	Bodri Capital Management
2	49	Mellon Private Wealth Management
	50	Teachers Insurance & Annuity Association
3	51	BlackRock Investment Management, LLC
	52	Markston International, LLC
4	53	EagleRock Capital Management
	54	Stephen K. Workman
5	55	Robeco Investment Management Inc. (WPG)
	56	Marshall Wace, LLP
6	57	Credit Suisse Securities (USA) LLC
	58	Citi Investment Research (US)
7	59	Northern Trust Global Investments
	60	Thomas Weisel Asset Management
8	61	Kenwood Capital Management, LLC
	62	S.A.C. Capital Management, LLC
9	63	Geode Capital Management, LLC
10	64	Mercantile-Safe Deposit and Trust Company
	65	JPMorgan Private Bank (United States)
11	66	Florida State Board of Administration
	67	Ohio Public Employees Retirement System
12	68	NorthStar Capital Funds, LLC
	69	Polar Capital Partners Ltd.
13	70	UBS Securities LLC
	71	Credit Suisse Asset Management, LLC (US)
14	72	Goldman Sachs Asset Management (US)
	73	NWD Investments
15	74	DWS Investment GmbH
	75	Van Wagoner Capital Management, Inc.
16	76	SunTrust Bank
	77	AllianceBernstein LP
17	78	Ridgecrest Investment Management, LLC
	79	Goldman Sachs & Company, Inc.
18	80	AIG Global Investment Group, Inc.
	81	BNL Gestioni SGR S.p.A.
19	82	HBK Investments, LP
	83	Millennium Management, LLC
20	84	RhumbLine Advisers Corp.
	85	Boston Financial Management, Inc.
21	86	Suffolk Capital Management, LLC
	87	Morgan Stanley & Co. Inc.
22	88	Tradeworx Inc.
	89	James D. Marver
23	90	Metropolitan Life Insurance Co. (US)
	91	Public Employees' Retirement Association of CO
24	92	Kentucky Retirement Systems
	93	Empire Financial Group
25	94	William Blair & Company, LLC
26		
27		
28		

1	95	Teleos Asset Management, LLC
	96	Firsthand Capital Management, Inc.
2	97	MFC Global Investment Management
	98	AIM Trimark Investments
3	99	Banque et Caisse d'Epargne de l'Etat Luxembourg
	100	ProFund Advisors LLC
4	101	Piper Jaffray & Co.
	102	Alexandra Global Master Fund Ltd
5	103	Whitebox Diversified Conv. Arb Partners LP
		c/o Trident Trust
6	104	Needham Emerging Growth Partners, LP
7	105	Eugene V. Thaw Revocable Trust
	106	Bonny Israeloff Irrevocable Trust
8	107	Robert L. Israeloff Irrevocable Trust
	108	Morton Seaman
9	109	Irwin W. Silverberg IRA
10	110	Stanley Kaplan IRA
	111	Delaware Charter Guarantee & Trust
11	112	Suzanne Chase
	113	Female Care Assoc. PA Professional Sharing Trust
12	114	Benetar Bernstein Schair & Ste. Employee Pension Plan & Trust
	115	James W. Armour Jr.
13	116	Frederic Quitkin
	117	Herbert R. Kameon Living Trust
14	118	Hall Family Trust
	119	Joe and Truly Daniel Revocable Trust
15	120	Colby & Gale Inc Profit Sharing Plan
16	121	Dr. Alfred G. Dickerson IRA
	122	M R Johnson Family Trust
17	123	Esther Nugent IRA
	124	Dianne Gozonsky IRA
18	125	Benetar Bernstein Schair and
		Stein Employee Profit Sharing Plan & Trust
19	126	Elliott H. Solomon IRA
20	127	Hugh J. Helfenstain Recovable Trust
	128	Donald Lewis Davies and
21		Nancy Nairn Davies Revocable Living Trust
22	129	David Dannenbring & Barbara Dannenbring
	130	John Fisher & Iris Fisher
23	131	Thomas Weisel Partners LLC
	132	Acadia Trust
24	133	Todd A. Grossmann PSP
	134	Stephen W. Broberg and Deidre Broberg
25	135	Elizabeth P. Hicks IRA
	136	H. Christina Guy
26	137	G E Johnson Family Living Trust
27	138	Judith Polcer & Edward Polcer
28	139	Jean D. Thurston

1	140	Janet Danner McKinney
	141	Eric C. Clark
2	142	Alan E. Stallings Jr. MD
	143	Frederick E. Taber MD
3	144	Craig I LP
	145	Barbara Marie LA Viletta
4	146	Alan E. Freeland
	147	St. Matthews Episcopal Church
5	148	Trinity Episcopal Church
	149	Episcopal Diocese of Mississippi Gray Center
6	150	George A. Callaway
	151	Thomas H. Krocak
7	152	Paula Tietz IRA
	153	The Beltram Family Trust
8	154	Lynn Perkins Trust
	155	Dale Wilson Special Need Trust
9	156	Henry & Jeanette Mok Revocable Trust
10	157	Episcopal Diocese of Mississippi John Maury Allin Diocesan House
	158	Martha Drilling
11	159	W.H. Merrell Jr. MD
	160	Russell E. Thompson and Betty A. Thompson
12	161	Arlyn J. McCombs Pershing LLC
	162	Lydia S. Rosner IRA
13	163	Susan H.E. Maurtiz
	164	Gary C. Hendrickson
14	165	Mary M. Fisher & Larry M. Fisher
	166	Loretta Davis IRA
15	167	Joyce L. Beene
	168	Margaret T. Ward
16	169	Robert L. Riggs
	170	Leighann Redding
17	171	Janice C. Brown Revocable Trust
	172	Thomas C. Brooks & Krisztina M. Brooks
18	173	Lynn Anne Ishizaka & Robert T. Ishizaka Community Property
	174	National Financial Services
19	175	F Europe LTD fbo O'Connor
	176	CS Sec Eur LTD
20	177	Palisade Capital
	178	DB Securities Service NJ Wachovia National Bank
21	179	Man Mac 1, Ltd
	180	DB AG Equity Swaps Offshore Consolidated
22	181	International Monetary Fund
	182	Fortissimo Fund c/o Symphony Asset
23	183	US Rapid
	184	A G Edwards & Sons
24	185	First Trust & Company
	186	Tennenbaum Capital Partners, LLC
25	187	Aristeia International Limited
26		
27		
28		

188 Aristeia Partners, LP
189 Arpeggio Fund
190 CNH CA Master Account, L.P.
191 CSV Limited
192 Encore Fund LP
193 Ore Convertible Master Fund Ltd.
194 Fore ERISA Fund Ltd
195 Fore Multi Strategy Master Fund Ltd.
196 FGO Master Fund Ltd
197 IMF Converts
198 Rhapsody Fund
199 Wolverine Asset Management
200 Cede & Co.

CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: D. Anthony Rodriguez, drodriguez@mofo.com; Abby E. Wilkinson, awilkinson@faegre.com; Eva Krisztina Schueller, eschueller@mofo.com; Michael B. Fisco, mfisco@faegre.com; Paul T. Friedman, pfriedman@mofo.com.

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/s/ L. Rex Sears

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